IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SKYLINE PROPERTIES, INC., and MARLENE PENOR, Appellants, v. WESTWOOD EXECUTIVE HOMES, LTD, and JOHN URBAN, Respondents.	)	No. 62548-9-I DIVISION ONE UNPUBLISHED OPINION FILED: June 8, 2009

AGID, J.—Whether an agent has sufficiently disclosed his or her representative capacity to avoid personal liability on a contract generally is a question of fact. Here, summary judgment determining that John Urban signed a real estate listing agreement only as a corporate officer was inappropriate. Urban signed the contract in his own name without referring to his corporate office, and the limited parol evidence available does not establish as a matter of law that the parties intended Urban to have no personal liability. We reverse and remand for further proceedings.

FACTS

In October 2004, Skyline Properties, Inc., agent Marlene Penor contacted builder John Urban about a 27-lot subdivision that was for sale. Penor had seen other

homes Urban had built and told him that she believed she would have no problem selling similar homes priced between $600,000 and $700,000 if he built in the subdivision. She also thought she could sell 12 such homes in six months. Westwood Executive Homes, Ltd., a corporation for which Urban is the sole shareholder, purchased the property.

Urban and Penor agreed that Penor would be the listing agent for homes Urban built in the subdivision. In January 2005, Urban and Penor signed a written "Letter of Authorization," which granted Penor authority to sell the homes for a three percent commission until February 2006 at prices between $550,000 and $700,000. The agreement described the property's owner as "Westwood Executive Homes" and the builder as "John Urban." Two lines on the form were provided for signatures of the sellers. "Westwood Executive Homes" was handwritten on the first and "John Urban" on the second. Underneath the signature lines was the printed line "John Urban, Westwood Executive Homes."

The parties signed a new "Letter of Authorization" in May 2005 based on the same form as the January agreement, but with several differences in how the form was filled out and signed. While the descriptions of the owner and builder were the same as in January, Urban signed the May agreement as a seller only in his own name. "Westwood Executive Homes" was not handwritten in as before, and the typed name beneath the signature lines stated only "John Urban." No statement that Urban was an officer or agent of Westwood appears anywhere on the form. The new agreement also reduced the lower end of the price range to $503,000, excluded lot 12 from Penor's

authority to sell the properties, and set a new termination date in May 2006.

By June 2005, Penor had sold only four properties. Urban felt she had not worked hard enough to sell the homes. Penor, on the other hand, believed Urban had not timely completed construction or otherwise provided sufficient resources, such as a model unit, to sell the properties more quickly. They were not able to resolve their differences. In July 2005, Urban terminated Penor's authority to sell the properties.

Skyline and Penor filed suit against Westwood and Urban personally, claiming a breach of the May agreement. They sought compensation for expenses, for time spent attempting to sell the properties, and for lost commissions on sales after July 2005.

Urban and Westwood filed a motion for summary judgment based on several theories. The trial court denied summary judgment as to any claims against Westwood[1] but dismissed the claims against Urban personally based on his argument that there was no issue of fact that he had acted in an individual rather than a corporate capacity. Skyline and Penor eventually obtained a final judgment against Westwood through arbitration. They now appeal the order granting summary judgment to Urban on his personal liability.

DISCUSSION

Skyline and Penor contend that the trial court erred by dismissing their claims against Urban personally because the evidence presents a genuine issue of material

[1] Westwood and Urban jointly moved to dismiss all of Skyline's claims on the theory that Skyline was not damaged because their agreement with Penor required them to pass all commissions through to her. They also moved to dismiss Penor's claims on the theory that any agreement ran only to Skyline and not to her, and that her claims were barred by the statute of frauds. The denial of summary judgment on these theories is not at issue in this appeal.

fact as to Urban's personal liability under the May 2005 agreement. We agree.

We review summary judgment orders de novo and engage in the same inquiry as the trial court.[2] We will affirm a summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[3] We construe the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party.[4]

A party who seeks recovery on a contract has the initial burden of proving that the defendant was a party to that contract.[5] "[O]nce this initial determination has been established, the burden shifts to the defendant, who, in order to escape liability, must show his promise was made solely in the capacity of agent for a disclosed principal."[6] "Whether an agent has disclosed the identity of his principal so as to avoid personal liability is a question of fact."[7]

We generally give words in a contract their ordinary meaning.[8] Washington courts have long recognized that a corporate officer may incur personal liability on a contract because of the manner in which he or she signs the agreement.[9] Contrary to Urban's characterization of the May agreement as a contract between only Skyline,

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[2] Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).
[3] CR 56(c); Huff v. Budbill, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000).
[4] Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).
[5] Matsko v. Dally, 49 Wn.2d 370, 373, 301 P.2d 1074 (1956) (citing 2 Restatement, Agency, § 320(b)).
[6] Id.
[7] Crown Controls, Inc. v. Smiley, 47 Wn. App. 832, 839, 737 P.2d 709 (1987), aff'd, 110 Wn.2d 695, 756 P.2d 717 (1988).
[8] Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005).
[9] Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 695, 952 P.2d 590 (1998); Schwab v. Getty, 145 Wash. 66, 70, 75, 258 P. 1035 (1927); Gavazza v. Plummer, 53 Wash. 14, 15, 101 P. 370 (1909).

Penor, and Westwood, the plain language clearly identifies the parties as Skyline, Penor, and "the undersigned." Unlike the January agreement, the only "undersigned" is "John Urban." Urban notes that the May agreement retained the reference to Westwood as owner, but this reference, at most, creates an ambiguity because the agreement did not make the "owner" a party.[10] Accordingly, the plain language of the May agreement raises a genuine issue of material fact as to Urban's personal liability.

Citing the context rule of Berg v. Hudesman,[11] Urban nonetheless contends that the circumstances surrounding the formation of the May agreement provide such clear indicia that the parties intended only liability on the part of Westwood that summary judgment was appropriate. We agree with Urban that parol evidence is properly considered in this setting.[12] But the trial court was provided only very limited evidence on this point in the summary judgment materials. Most of the declaration and deposition testimony concerned Westwood and Urban's other theories of summary judgment or went to issues that would only arise at trial. There was no testimony from Urban that he intended to incur only corporate liability, and there was no testimony from Penor acknowledging that she understood Urban signed only in his corporate capacity.

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[10] See Wilson Court, 134 Wn.2d at 705 (court must give reasonable effect to each part of an agreement; therefore language contemplating three separate entities—landlord, tenant, and guarantor—implies that guarantor was intended to be a separate entity from the tenant). Like the January agreement, the May agreement contained no signature line for either the "owner" or the "builder," instead using the term "seller."

[11] 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

[12] See Puget Sound Nat'l Bank v. Selivanoff, 9 Wn. App. 676, 679, 514 P.2d 175, review denied, 83 Wn.2d 1004 (1973). We therefore agree with Urban that case law cited by Skyline and Penor specifically limiting the type of evidence that may be considered under the Uniform Commercial Code, Title 62A RCW, on this point is of limited utility in this setting. See Schwab v. Getty, 145 Wash. 66, 70, 258 P. 1035 (1927) (law governing negotiable instruments does not necessarily apply to simple contract).

Urban emphasizes that he signed the January 2005 authorization as "John Urban, Westwood Executive Homes."[13] But more than one inference can be drawn from the differences in the way the two agreements were completed and signed. While the absence of the reference to Westwood as a party on the May form could have been a mere oversight, it can also be inferred that the change was intentional. Neither Urban nor Penor was asked during their depositions about the changes in the way the May agreement was signed.[14] Notably, while Urban complained that Penor had made unauthorized changes she did not point out to him, when asked to list such changes, Urban did not identify differences in the signature block or the lack of any reference to Westwood Homes as an "undersigned" or a party.[15] Moreover, nothing in the record shows Urban was prevented from completing and signing the May form the same as the January form, if that was his desire.

Urban also points out that Penor was obviously aware that Westwood was a corporation and had an ownership interest because she was the selling broker when Westwood purchased the land in 2004. But he fails to address Penor's deposition testimony that she did not believe Urban had told her that he was the president of

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[13] Urban did not add any designation of his corporate office such as "Pres." or "President" to his signature on either the January or May agreement, which he easily could have done. And even if he had, the effect would be to simply create an ambiguity and does not necessarily compel a finding that only corporate liability was intended. See Wilson Court, 134 Wn.2d at 704-05.

[14] Neither the May nor the January agreement was even made an exhibit during Penor's lengthy deposition.

[15] As for other differences between the January and May authorization agreements, Urban acknowledged that some changes were intentional and agreed, such as the exclusion of lot 12 and the specification of particular publications to be used for marketing. But he testified that he had not agreed to lowering the price range and extending the agreement to May 2006, and he faulted Penor for failing to bring those changes to his attention when he signed the document.

Westwood. Nor does the record establish as a matter of law that Penor knew that Westwood maintained exclusive ownership of the properties once the homes were built.

In sum, the limited parol evidence, which we must consider in the light most favorable to Skyline and Penor, does not establish as a matter of law that the parties understood Urban acted only in his corporate capacity in signing the May agreement.

For the first time on appeal, Urban advances additional arguments in support of summary judgment on the issue of his personal liability. Because the January agreement was in place when the May agreement was signed, Urban contends that Penor necessarily must have violated her statutory and common-law obligations to Westwood as its real estate agent. Urban reasons that if Penor intentionally altered the terms of the January agreement without specifically pointing the changes out to Urban when he signed the May agreement, she violated her duty of fidelity, and if she did so inadvertently, she violated her duty to perform competently.[16]

But issues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal.[17] Urban's argument for summary judgment on personal liability was very limited. Without providing a copy of the May agreement, he argued only that "[e]ach of the documents relevant to the real property which is the subject of the

[16] The precise legal bases for Urban's arguments are not clear, but it appears Urban means to invoke principles akin to estoppel or reformation, to essentially argue as a matter of equity that Penor should not be allowed to take advantage of the change in language between the January and May agreements because she prepared the documents.

[17] Ferrin v. Donnellefeld, 74 Wn.2d 283, 285, 444 P.2d 701 (1968); Concerned Coupeville Citizens v. Town of Coupeville, 62 Wn. App. 408, 413, 814 P.2d 243, review denied, 118 Wn.2d 1004 (1991).

alleged contract herein bears the signature block of Westwood Executive Homes Ltd." and that "[t]here are no relevant documents which do not reflect the corporate interest." Skyline and Penor appropriately responded by producing the May agreement and other materials discussed above that refuted those claims. Given Urban's specific argument, there was no reason for Skyline and Penor to produce evidence addressing these new and much different claims based on Penor's duties as Westwood's agent. Accordingly, we do not consider Urban's new contentions here.[18]

We reverse the order on summary judgment and remand for further proceedings consistent with this opinion.

Agid, J.

WE CONCUR:

Dwyer, A.C.J.

Schindler, C.J.

[18] As Skyline and Penor argue, it appears that these issues present material questions of fact making summary judgment inappropriate in any event.